

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

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Docket No. 155,166

## ORDER

The Kansas Workers Compensation Fund requests review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey on July 26, 1994.

## APPEARANCES

Claimant appeared by and through his attorney Michael E. Francis of Topeka, Kansas. Respondent and its insurance carrier appeared by and through their attorney Bret C. Owen of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney Chris Miller of Lawrence, Kansas. There were no other appearances.

## RECORD

The record as specifically set forth in the Award of the Special Administrative Law Judge is herein adopted by the Appeals Board.

## STIPULATIONS

The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

### ISSUES

Whether claimant is entitled to seventy (70) weeks temporary total disability compensation from the date of injury March 6, 1991 through the date of claimant's death on July 7, 1992.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board finds claimant was permanently and totally disabled as a result of injuries suffered to his low back on March 6, 1991.

Claimant, a manual laborer for respondent, injured his back on March 6, 1991. He was provided medical care by Dr. William A. Bailey a board-certified orthopedic surgeon through June 1992, shortly before claimant's death from unrelated causes.

The respondent and the Workers Compensation Fund argue that Dr. Bailey rated claimant at twenty percent (20%) permanent partial impairment to the body as a whole on August 12, 1991, and thus claimant, while being entitled to a permanent partial impairment, is neither entitled to the temporary total disability benefits awarded by the Special Administrative Law Judge, nor to a permanent total award as claimed by claimant's heirs.

In reviewing the medical evidence in the record the Appeals Board notes Dr. Bailey, while assessing claimant a twenty percent (20%) functional impairment, also noted in his August 12, 1991 letter, that claimant would be unable to return to "any type of employment at all." Dr. Bailey followed the August 12 letter with an August 22, 1991 letter which indicated claimant's inability to work was due to his orthopedic problems, in particular the ruptured disk in claimant's lumbar spine.

Evidence was also provided regarding claimant's ability to return to the labor market through the testimony of Lloyd Dean Langston. Mr. Langston found claimant to be totally unable to engage in any employment in the open labor market.

K.S.A. 44-501 and K.S.A. 44-0508(g) make it claimant's burden to prove his entitlement to benefits by proving the various conditions upon which his right to benefits depends by a preponderance of the credible evidence. See also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

In the Award the Special Administrative Law Judge found claimant to be temporarily totally disabled from the date of injury through his date of death. K.S.A. 1990 Supp. 44-510c(b)(2) defines temporary total disability as follows:

"Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment."

The purpose of temporary total disability compensation is to compensate an injured worker during the time it takes the worker to recover from an injury. The medical testimony from Dr. Bailey indicates claimant was not temporarily incapable of engaging in any type of substantial and gainful employment but rather suffered an injury which would have an effect upon his ability to return to work for the remainder of claimant's life.

K.S.A. 1990 Supp. 44-510c(a)(2) defines permanent total disability as follows:

"Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, shall, in the absence of proof to the contrary, constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

The medical evidence of Dr. Bailey indicates claimant is incapable of returning to work as a result of the injuries to his low back. Lloyd Dean Langston further substantiates Dr. Bailey's opinion that claimant would be incapable of returning to work at anytime.

The medical opinion evidence of Dr. Bailey and the testimony of Mr. Langston are uncontradicted. Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy and such uncontradicted evidence should ordinarily be regarded as conclusive. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

The Appeals Board finds the evidence in this matter supports a finding that claimant was permanently totally disabled through the date of his death on July 7, 1992.

In awarding permanent total disability compensation to the claimant, the Appeals Board in no way modifies the finding by the Special Administrative Law Judge regarding the contribution due and owing from the Kansas Workers Compensation Fund per the agreement of the parties.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey shall be modified and an award of compensation is hereby made in favor of the claimant, Richard E. Burkard, and against the respondent, Morton Building Materials, Inc., and its insurance carrier, Travelers Insurance Company, and the Kansas Workers Compensation Fund, for an accidental injury occurring on March 6, 1991, and based upon an average weekly wage of \$331.67, for 22.57 weeks temporary total disability compensation at the rate of \$221.12 per week for the period March 6, 1991, through August 11, 1991, followed thereafter by 47.29 weeks permanent total disability compensation at the rate of \$221.12 per week totaling

\$10,456.76 for a total award of \$15,447.44 which, as of the date of this award, is all due and owing and ordered paid in one lump sum minus amounts previously paid. Pursuant to the agreement between respondent and the Fund, respondent would be responsible for payment of the temporary total disability compensation above awarded and for an equivalent amount of disability equal to a 20% permanent partial whole body disability through the date of claimant's death, in the sum of \$2,091.16 for a total due and owing by respondent of \$7,081.84. The remaining sum of \$8,365.60 shall be and is payable from the Kansas Workers Compensation Fund.

Claimant is further awarded unauthorized medical expense of up to \$350.00 upon presentation of an itemized statement verifying same.

Claimant's attorney fee contract is hereby approved insofar as it is not in contravention with K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Curtis, Schloetzer, Hedberg, Foster & Associates Transcript of Regular Hearing	\$ 73.41
Appino & Achten Reporting Service Deposition of William A. Bailey, M.D.	\$156.80
Deposition of Lloyd Dean Langston	\$205.80
Braksick Reporting Service Deposition of Michael A. Well, M.D.	\$ 94.05

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael E. Francis, Topeka, Kansas  
Bret C. Owen, Topeka, Kansas  
Chris Miller, Lawrence, Kansas

William F. Morrissey, Special Administrative Law Judge  
Philip S. Harness, Director